

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK SHAWN JOHN, JR.,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 295680

Grand Traverse Circuit Court

LC No. 09-010800-FH

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Derrick Shawn John, Jr., challenges his jury trial conviction of second-degree home invasion¹ based on the sufficiency of the evidence. John was sentenced to 120 to 270 months' imprisonment, but contends error in the scoring of offense variables (OVs) 12 and 13.² We affirm John's conviction but remand for resentencing.

John was charged with three counts of second-degree home invasion for incidents spanning approximately a two week period and involving three different residences. The jury was unable to reach a verdict on two of the charges, but convicted John for the events that occurred at the Trolz residence on March 5, 2009. John Trolz returned from walking his children to school and running errands to discover his television on the floor, the contents of his computer desk strewn about the room, and several items were missing. When the Trolz home invasion occurred, police were already on the lookout for John's vehicle because it was observed in footage from a surveillance camera obtained from an earlier home invasion. John's truck was spotted in the neighborhood of the Trolz home on the morning of the break in of that residence. Later in the day, a police officer was able to effectuate a traffic stop of John within approximately a five mile radius of the Trolz residence. A search of John's vehicle recovered several of the items stolen from that break in.

¹ MCL 750.110a(3).

² John was sentenced as a second habitual offender. MCL 769.10.

After John's arrest, officers went to the home of Jeremy Dimarzo, where John was currently residing. The officers recovered from the Dimarzo residence additional items that had been stolen from the Trolz residence and from the other two charged home invasions. Police also recorded a conversation between John and Dimarzo. In that recording, John requested that Dimarzo dispose of a specific pair of John's shoes. Instead of complying with John's request, Dimarzo turned the shoes over to police. Police discovered footprints in the snow around the Trolz residence and another home invasion victim's residence. These footprints were photographed and analyzed by a crime scene technician, who testified that the footprint patterns found near both residences were similar and consistent with the pattern on John's shoes.

John contends that there was insufficient evidence to convict him of home invasion. This Court reviews a claim of insufficient evidence *de novo*.³ The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt.⁴ The elements to prove second-degree home invasion include: (1) entry of a dwelling without permission and (2) the intent to commit or the actual commission of a larceny while in the dwelling.⁵ "Identity is an essential element of every offense."⁶

John contends that his identification as the perpetrator of the crime was improperly based solely on his possession of the stolen property. Contrary to John's assertion, the circumstantial evidence presented at trial combined with his possession of the stolen property was sufficient to support his conviction of second-degree home invasion.⁷ Specifically, John was found with the stolen property only five miles from the victim's home and his vehicle was sighted in the neighborhood during the timeframe when the home invasion was believed to have occurred. The footprints found outside the residence were similar to the pattern of a pair of shoes belonging to John, which he had asked a friend to dispose of following his arrest. John also inquired about coins found by police, which were later identified as being stolen from the Trolz home.

It is incumbent on the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence.⁸ "Circumstantial evidence and the reasonable inferences

³ *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

⁴ *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

⁵ See *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004); MCL 750.110a(3).

⁶ *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

⁷ *People v Rankin*, 52 Mich App 130, 131-132; 216 NW2d 620 (1974); *People v Hayden*, 132 Mich App 273, 283 n 4; 348 NW2d 672 (1984).

⁸ *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

drawn therefrom may be sufficient to prove the elements of a crime.”⁹ The circumstantial evidence in this case reasonably gave rise to the inference that John was the perpetrator of the Trolz home invasion and had stolen the property that was in his possession at the time of his arrest. There was sufficient evidence to support John’s conviction as his possession of the stolen property was not “[u]naccompanied by other facts or circumstances indicating guilt.”¹⁰

John also challenges the scoring of OV 12 and OV 13. We review the points assessed by a trial court under the sentencing guidelines for an abuse of discretion.¹¹ This Court determines whether the trial court “properly exercised its discretion and whether the record evidence adequately supports a particular score.”¹² “The proper interpretation of the sentencing guidelines is a question of law that this Court reviews de novo.”¹³

John first argues that OV 12¹⁴, which encompasses contemporaneous felonious criminal acts, should have been scored at one point instead of five points. Contemporaneous felonious criminal acts are statutorily defined as acts occurring “within 24 hours of the sentencing offense” that “will not result in a separate conviction.”¹⁵ The trial court assigned the score of five points based on the crimes of receiving and concealing stolen property and larceny in a building. Another panel of this Court has recently interpreted the statutory language governing this variable and determined that “OV 12 distinguishes between the ‘act’ that occurred and the ‘sentencing offense’. . . . indicat[ing] that the Legislature specifically intended to draw a distinction between the two words.”¹⁶ In practical application, when scoring this variable, a trial court is required to “look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.”¹⁷

Second-degree home invasion encompasses the following:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without

⁹ *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009) (citation omitted).

¹⁰ *Rankin*, 52 Mich App at 132.

¹¹ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹² *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

¹³ *People v Bemmer*, 286 Mich App 26, 31; 777 NW2d 464 (2009).

¹⁴ MCL 777.42.

¹⁵ MCL 777.42(2)(a).

¹⁶ *People v Light*, ___ Mich App ___, ___ NW2d ___ (Docket No. 293746, issued November 23, 2010), slip op, p 4.

¹⁷ *Id.*

permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.¹⁸

A larceny in a building is statutorily defined as:

Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.¹⁹

The statutory language demonstrates that all of the elements necessary to commit the crime of larceny in a building are “completely subsume[d]” within the sentencing offense of second-degree home invasion.²⁰ Because, “the language of OV12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be other acts than the sentencing offense and not just other methods of classifying the sentencing offense,” the trial court erred in using the crime of larceny in a building as a contemporaneous felonious act in the scoring of this offense variable.²¹ As John does not challenge the trial court’s scoring of receiving and concealing stolen property, one point should be assessed under this variable.²²

Next, John challenges the scoring of OV 13, which pertains to a continuing pattern of criminal behavior.²³ The trial court assigned 25 points on this variable finding, “the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”²⁴ Offenses considered under OV 13 must have occurred within a five-year period but need not have resulted in a conviction.²⁵ The scoring of OV 13 includes the sentencing offense.²⁶ The trial court assessed 25 points because it determined that the preponderance of the evidence proved that John committed all three of the charged home invasions. Sentencing factors must be

¹⁸ MCL 750.110a(3).

¹⁹ MCL 750.360.

²⁰ *Light*, ___ Mich App ___, slip op at 6.

²¹ *Id.*

²² MCL 777.42(1)(f).

²³ MCL 777.43.

²⁴ MCL 777.43(1)(c).

²⁵ MCL 777.43(2)(a).

²⁶ *Id.*

proved by a preponderance of the evidence.²⁷ The trial court has discretion when determining the scoring of the offense variable score and such determination is upheld if there is record evidence to support the score.²⁸

The record supports the trial court's finding that John was responsible for all three charged home invasions. John was in possession of stolen property from all three homes. There was also ample circumstantial evidence such as the footprints in the snow, sightings of John's vehicle in the vicinity of the crimes, and John's communications and relationship with one of the victims to place John at all three crime scenes.

Reducing the scoring of OV 12 to one point alters John's classification from F-IV to F-III and reduces the minimum sentencing guidelines range to 43 to 107 months.²⁹ Because correction of the erroneous score would result in a different recommended range, resentencing is necessitated.³⁰

Affirmed in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Joel P. Hoekstra

/s/ Michael J. Talbot

²⁷ *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

²⁸ *Hornsby*, 251 Mich App at 468.

²⁹ MCL 777.21; MCL 777.64.

³⁰ *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).